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NO. 675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CRAWFORD MARTIN, as Secretary of State of the State of Texas, JOHN CONNALLY, as Governor of the State of Texas, WAGGONER CARR, as Attorney General of the State of Texas, and EUGENE LOCKE, as Chairman of the State Democratic Executive Committee of Texas,
Defendants-Appellants

vs.

GEORGE H. W. BUSH, MRS. TOM. M. THAWLEY, ROLAND E. SLEDGE, ANTHONY J. P. FARRIS, and BARBARA BARRETT,
Plaintiffs-Appellees

and

PETER O'DONNELL, JR., as Chairman of the State Republican Executive Committee of Texas, WILLIAM M. ELLIOTT, as County Judge of Harris County, Texas, and ROBERT E. TURRENTINE, JR., as County Clerk of Harris County, Texas,
Defendants-Appellees

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

APPELLANT CHAIRMAN OF THE STATE DEMOCRATIC EXECUTIVE COMMITTEE OF TEXAS' SUPPLEMENTAL BRIEF IN OPPOSITION TO THE APPELLEES' MOTION TO AFFIRM

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

In the light of the recent decision of this Court in *Wesberry v. Sanders*, Docket No. 22, this Term, it is of the utmost importance that this Honorable

Court fully appreciate and consider the substantial difference in posture between the *Wesberry* case and the case at bar. This appellant respectfully submits that since congressional elections are already in progress in Texas, no order should be issued in this case which would have the effect of interrupting or interfering with those elections.

Wesberry reached this Court as an appeal from an order of dismissal by a divided trial court. However, all three of the Trial Judges agreed that even if the majority had reached a contrary result, they would have denied injunctive relief to the plaintiffs until the Georgia Legislature had ample opportunity to correct the "abuses" in apportionment.

Accordingly, in holding that the dismissal was improperly ordered, this Court reversed and remanded *Wesberry* with the comment that "the question of what relief should be given we leave for further consideration and decision by the District Court in light of existing circumstances."

Unlike *Wesberry*, the case at bar reached this Court as an appeal from mandatory injunction which provided that:

> "Pending enactment by the State of Texas of substitute legislation in the place of Art. 197a (i.e., the Texas congressional districting statute which the Trial Court held unconstitutional and void), all Members of Congress for the State of Texas shall be nominated and elected from the State at Large."

Mr. Justice Black stayed the effect of the Trial Court's mandatory injunction pending action by this Court on this appeal.

There is a most serious question as to whether the Trial Court, or this Court, has either jurisdiction or authority to order the mandatory injunction prescribed by the Trial Court.

In the first place there are 254 county clerks, 508 county chairmen, 124 state executive committee members, and literally scores of other party and state officials who are not now and never have been before this Court or the Trial Court but who will have to be subject to the orders of any Federal Court which attempts to enforce the mandatory injunction in question.

Moreover the effect of the mandatory injunction is to convert the case at bar into a suit against the State of Texas rather than against the individual defendants, because the mandatory injunction does far more than enjoin individuals from enforcing an unconstitutional statute. It is an order commanding affirmative action on the part of literally hundreds of officials who hold their offices solely by virtue of state statute—commanding such state officials to hold at-large elections for 23 congressional places. To enforce such an affirmative order is to exercise jurisdiction over the State, and such a suit by private individuals against the State, in the absence of a voluntary waiver of the State's immunity from suit, is in direct violation of the

prohibition contained in the Eleventh Amendment to the Constitution of the United States.

However, without reaching the question of the authority and jurisdiction of the Federal Courts to issue the mandatory injunction in question, there are other good and sufficient reasons why the mandatory injunction should not be permitted to interfere with the congressional election now in progress in Texas and therefore, why the mandatory injunction should not be made effective, if at all, until after the general election in November of this year.

With the mandatory injunction stayed pending action in this case, the Texas election process has proceeded in accordance with existing Texas election laws, including the challenged congressional districting statute (Art. 197a).

On or before February 3, 1964, which was the statutory deadline for filing in the primaries of all political parties in Texas, both Democratic and Republican candidates filed in every one of Texas' 23 congressional races.

Barring the death or withdrawal of a candidate in a race in which he is the only entrant, under the Texas election laws there is no provisions for any further filing in any congressional race. The mere declaration that the Texas congressional districting statute is unconstitutional will not change that situation, because the filing dates are controlled by general statutes which apply to all state, district, and local offices in Texas, including, but far from limited to, congressmen.

Neither is there any provision under Texas law which will permit the calling of any special election to fill the 23 at-large congressional places created by the Trial Court's mandatory injunction.

By statute, the Democratic and Republican state executive committees must meet on March 9, 1964, to certify the names of all *statewide* candidates that will appear on the primary ballots. Further by statute, the Democratic and Republican county executive committees must meet on March 16, 1964, to certify the names of *all* candidates that will appear on the primary ballots. Also, by statute, the primaries of both parties will be held on May 2, 1964, to elect each party's nominees. For any race in which no candidate receives a majority of the votes in the May 2nd primary, a run-off primary will be held on June 6, 1964. The Texas election statutes also provide for a period for absentee voting preceding both the May 2nd and the June 6th primaries.

Thus, the election process for the election of Texas' 23 congressmen is already well under way in accordance with Texas general election statutes which apply to all state, district, and local offices.

If this Court should now merely affirm the judgment of the Trial Court in this case and do nothing more, Texas may well be faced with the dilemma of having no way whatever in which it can elect the 23 congressmen to which it is properly entitled.

Here are only some of the many questions which

would have to be answered in the event of a mere affirmance of the Trial Court's order:

1. Since the statutory filing deadline has now been passed, how can any additional candidates file for any of the 23 at-large places required by the Trial Court's order?

2. Or, if no more candidates are to be permitted to file, can the Democratic and Republican state executive committees at their statutory meetings on March 9, 1964, certify as candidates those who have heretofore filed for 22 district congressional places and 1 congressional place at-large, even though those who have filed for 22 district congresisonal places have filed with the party county executive committees and have paid the filing fees prescribed for district congressional races rather than the filing fees prescribed for at-large congressional places?

3. If only those congressional candidates who have already filed are permitted to file, would not those have a right to complain who would have filed if they had been advised that all of the congressmen were to be elected at-large instead of by districts?

4. Or, on the other hand, if additional congressional candidates are to be permitted to file, to what date will the filing deadline be advanced—and how, because the general election statute controlling the filing deadlines are certainly not themselves unconstitutional, and is any Federal Court going to undertake to

rewrite Texas' general election laws merely to permit all congressmen to run at-large this year?

5. If a new and later filing deadline for congressional candidates is to be set by the Federal Courts, are the applications of congressional candidates, like those of all other candidates in Texas, going to be considered timely filed if they are mailed via registered or certified mail and postmarked before the deadline?

6. If additional congressional candidates are to be permitted to file under some advanced deadline to be set by the Federal Courts, by what date must their filing fees be paid?

The questions posed above do not attempt to reach the problems that would be created for independent candidates, and yet they make it abundantly clear that if the mandatory injunction of the Trial Court is permitted to stand, there will be absolute chaos in the procedure for the election of the 23 Texas congressmen. As stated above, this is because *Art. 197a, the Texas congressional districting statute which the Trial Court has held unconstitutional and void, does no more than prescribe the geographical boundaries of the various congressional districts. All of the other procedure governing the election of congressmen is prescribed by general election statutes which govern all elective offices in Texas, including congressmen.*

Therefore, since the election of the 23 Texas congressmen is now in progress, there is no way for the Federal Courts to require the at-large election of all 23 congressmen unless the Federal Courts are prepared and proceed to amend a large part of the Texas election laws by writing out in detail the election procedure that is to be followed in the at-large election of the congressmen.

And it is no answer to say that this problem can be easily solved by the calling of a special session of the Texas Legislature.

In the first place, the Governor of Texas is under no ministerial duty to call such a special session, and he will be well within his right if he declines to do so.

Moreover, even if a special session of the Legislature is called, there is certainly no assurance that any solution of the problem will be achieved.

Unless a statute receives at least 2/3's approval of each House of the Legislature, its effect is delayed until 90 days after the adjournment of the session. Even if the Governor should summon the Legislature to meet as early as the first of March, a 30-day session would not adjourn until the first of April, and unless a 2/3's approval of each House had been obtained (which, in the case of such a controversial and emotionally charged matter, would be almost impossible of achievement), any bill enacted would not become effective until the first of July,

which would be long after all party primaries—both first and run-off—would have been completed. Since the party and not the State pays the cost of holding its primary, the cost of holding a state-wide special primary for congressional seats alone would prohibit the holding of any such primary.

Even if a bill should receive the 2/3's approval of each House of the Legislature and thereby should become effective immediately upon adjournment of the special session on the first of April, there would then be only 30 days before the May 2nd primary within which the candidates would have to file, pay their fees, and conduct their state-wide campaigns. Thirty days is hardly time for the proper execution of the solemn process of electing the people's representatives to the most powerful legislative assembly in the history of the world.

In brief, now that the election of the 23 Texas congressmen is in progress, there is only one realistic approach to any final decree in the case at bar and that is that the effective date of any order entered herein shall be delayed until after the completion of the congressional elections now in progress (i.e., until after the general election in November of this year). Such a procedure would permit the orderly election of the Texas Members of Congress for the next two years, it would treat with entire fairness the candidates who have filed for congressional seats under the present election laws, and it would permit orderly congressional redistricting to

be carried out at the next regular session of the Legislature (which convenes in January of 1965) in compliance with the decision just handed down by this Court in *Wesberry*.

The Trial Court recognized the insoluble problems that would arise if the decision of this Court was delayed beyond the February 3rd filing date, because Judge Brown, in endeavoring to justify the majority's order making the mandatory injunction effective immediately, said: "Under the operation of the election machinery of Texas, the reapportionment must be accomplished by February 3, 1964. If authoritative decisions (by the Supreme Court) are not pronounced by that critical date, . . . relief, if it comes, will be effective then only as to congressional elections in 1966."

The continuing good faith of the Texas state officials was demonstrated less than 24 hours after this Court announced its decision in *Wesberry*, when the Governor of Texas sent the following telegram to the Lieutenant Governor and the Speaker of the House:

> "We are in agreement that the growth and transition of Texas population has made congressional redistricting imperative. A good faith effort to accomplish this was made by the last session of the Texas Legislature to no avail. As you know there is a Texas congressional redistricting case now pending in the United States Supreme Court. Although no action has been taken in our case, the Court in a similar case from Georgia has decided that it has jur-

> isdiction over congressional redistricting and has said that population is the only factor which can be taken into account in apportionment of congressional districts. This decision will obviously have a bearing on the Texas case and our action now must necessarily conform to the guidlines supplied by the Supreme Court in order to prepare for any eventuality. Therefore I respectfully request the Texas Legislative Council to immediately undertake a study of congressional redistricting in Texas in the light of the Supreme Court ruling."

At the trial of the case at bar the respective Chairmen of the Texas Senate and House committees on congressional redistricting testified under oath that while their previous efforts to obtain agreement on a congressional redistricting bill had proved unsuccessful, the Texas Legislature "would definitely reapportion the State when guidelines from the Federal Courts have been handed down."

To that uncontradicted testimony, there is now added the prompt and concrete action by the chief executive officer of the state, setting in motion the legislative machinery by which congressional redistricting can and will be accomplished.

In view of what is said above, this appellant respectfully submits that no order should be issued by this Court or by the Trial Court in the case at bar which would interrupt or interfere with the congressional elections now in progress in Texas, because the issuance of any such order would cause the Federal Courts to be faced with the unhappy choice

either (1) of causing complete chaos in the Texas congressional election now in progress or (2) of rewriting in substantial part the detailed statutory Texas election procedure in order to provide for the holding of new and unprovided for congressional elections.

Respectfully submitted,

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PROOF OF SERVICE

I, Frank C. Erwin, Jr., one of the attorneys for Appellant Eugene Locke, as Chairman of the State Democratic Executive Committee of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 19th day of February, 1964, I served copies of the foregoing Supplemental Brief in Opposition to Motion to Affirm on the several parties hereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

To William B. Cassin, Esq., 1600 Esperson Building, Houston, Texas 77002, and Thad T. Hutcheson, Esq., 2110 Tennessee Building, Houston, Texas 77002, Attorneys for Plaintiffs-Appellees.

To Joe Resweber, Esq., County Attorney of Harris County, Texas, Attention of Charles F. Mitchell, Esq., Assistant County Attorney, 202 Courthouse, Houston 2, Texas, Attorneys for Defendants-Appellees William M. Elliott, County Judge of Harris County, Texas, and Robert E. Turrentine, Jr., County Clerk of Harris County, Texas.

To Patrick B. Gibbons, III, Esq., 1400 First National Bank Building, Dallas, Texas, and Robert E. Newey, Esq., Houston First Federal Building, Houston, Texas, Attorneys for Defendant-Appellee Peter O'Donnell, Jr., Chairman of the State Republican Executive Committee on Texas.

To Waggoner Carr, Attorney General of Texas, P. O. Drawer R, Capitol Station, Austin, Texas, Attorney for Appellants Crawford Martin, as Secretary of State of the State of Texas, John Connally, as Governor of the State of Texas, and Waggoner Carr, as Attorney General of Texas.

FRANK C. ERWIN, JR.